Malayan Banking Bhd v Sparrows & Arrows Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-2962–11 OF 2011
MOHD HISHAMUDIN, ALIZATUL KHAIR AND LIM YEE LAN JJCA
1 MARCH 2013

Civil Procedure — Action — Premature action — Suit filed while negotiations between parties were still ongoing — Whether application premature

Contract — Agreement — Settlement agreement — Bank obtained summary judgment against guarantor upon default of loan — Guarantor made proposal for settlement of judgment sum — Failure to comply with conditions of settlement — Whether settlement agreement arose — Whether bank bound by terms of proposed settlement — Whether bank estopped from proceeding with execution of summary judgment

The appellant/defendant bank granted the first respondent/first plaintiff ('the company') a banking facility ('the facility'). As a security for the facility, the company assigned its rights, benefits and interest in a commercial property ('the property') to the appellant. One Mr Chew and Mdm Ling (the second respondent/second plaintiff) were the directors of the company and were the guarantors of the facility. The company defaulted on the facility and the appellant sued the company, Mdm Ling and Mr Chew to recover the outstanding sums. The appellant obtained summary judgment against all three of them for the sum of RM1,724,928.16. Mr Chew then proposed to the appellant a sum of RM1.8m as full and final settlement of the appellant's claim. The appellant via its letter dated 28 October 2010, agreed to the proposal subject to the condition that: (a) Mr Chew had to pay RM90,000 as upfront payment; (b) the balance sum of RM1,710,000 was to be paid on or before 29 March 2011 failing which the whole sum under the summary judgment would be recoverable by the appellant against all the respondents. The sum of RM90,000 was duly paid by Mr Chew to the appellant. In the meanwhile, Mdm Ling by a letter dated 22 February 2011 to the appellant made the following proposals: (a) a consolidation of five accounts with the appellant where she stood as a borrower and/or guarantor; (b) a settlement of the summary judgment obtained against Mdm Ling at RM1.8m; and (c) that the payment for the settlement sum would come from the proceeds of the public auction of her personal property ('Mdm Ling's house). The appellant by a letter dated 9 March 2011, replied that it was agreeable to the proposal to consolidate the five accounts. Mr Chew failed to pay the appellant the balance of the settlement sum by 29 March 2011 and hence the appellant proceeded with the

public auction of the property to recover the judgment sum. The learned Judicial Commissioner ('JC') granted the respondents the following declarations: (a) that a payment of the sum of RM1.8m by the respondents to the appellant would be a full and final settlement of the summary judgment; and (b) that there was an agreement between the respondents and the appellant that the settlement sum be paid from the proceeds of the sale of Mdm Ling house. The JC found that a contract existed between Mdm Ling and the appellant. The JC held that the appellant's conduct and in particular the consolidation of the various accounts and the withdrawal of the bankruptcy proceedings against Mdm Ling was an acceptance of Mdm Ling's offer to cap the company's amount owing to the appellant at RM1.8m and to settle the said amount from the sale of Mdm Ling's house. The appellant appealed against these declarations.

Held, allowing the appeal with costs:

(1) There was no contract between Mdm Ling and the appellant. On the facts there was no justification for invoking the doctrine of estoppel (see para 23).

(2) Far from giving any impression that the appellant was agreeable to Mdm Ling's proposals, vide her letter of 22 February 2011, on the contrary, reminded her of the appellant's insistence on compliance with the settlement agreement that the appellant had earlier made with Mr Chew, that had a dateline of 29 March 2011 for the payment of the sum of RM1.171m. Thus, the withdrawal of the bankruptcy proceeding against Mdm Ling was not a material factor justifying the invocation of the doctrine of estoppel. The content of the letter of 25 March 2011 by the appellant clearly militated against any invocation of the doctrine of estoppel (see para 26).

(3) The respondents' action was premature because the respondents filed the instant action before the appellant could respond fully to Mdm Ling's letter of proposal of 22 February 2011. The respondents filed the present suit when the negotiation between the parties was still ongoing. The appellant's reply to Mdm Ling's letter was dated 9 March 2011, and the letter stated that the appellant would revert at a later to Mdm Ling on the remaining proposals. Mdm Ling should have given the appellant an opportunity to give a further reply, as requested by the appellant. Yet, the respondents, in haste, filed their writ action on 15 April 2011 (see para 28).

[Bahasa Malaysia summary

Perayu/defendan bank telah memberikan responden pertama/plaintif pertama ('syarikat') kemudahan perbankan ('kemudahan'). Sebagai cagaran untuk kemudahan itu, syarikat itu telah menyerahkan hak, faedah dan

kepentingannya dalam hartanah komersial ('hartanah') kepada perayu. Encik Chew dan Puan Ling ('responden kedua/plaintif kedua') merupakan pengarah-pengarah syarikat itu dan penjamin-penjamin kemudahan itu. Syarikat itu telah gagal melaksanakan kemudahan itu dan perayu telah menyaman syarikat itu, Puan Ling dan Encik Chew untuk mendapat balik jumlah yang perlu dibayar. Perayu telah memperoleh penghakiman terus terhadap ketiga-tiga mereka untuk jumlah RM1,724,928.16. Encik Chew kemudian mencadangkan kepada perayu sejumlah RM1.8 juta sebagai penyelesaian penuh dan muktamad untuk tuntutan perayu. Perayu-perayu melalui surat bertarikh 28 Oktober 2010, bersetuju dengan cadangan itu tertakluk kepada syarat bahawa: (i) Encik Chew perlu membayar RM90,000 sebagai bayaran pendahuluan; (ii) jumlah baki RM1,710,000 perlu dibayar pada atau sebelum 29 Mac 2011 dan jika gagal keseluruhan jumlah di bawah penghakiman terus boleh didapat semula oleh perayu terhadap kesemua responden. Jumlah RM90,000 telah pun dibayar oleh Encik Chew kepada perayu. Sementara itu, Puan Ling melalui surat bertarikh 22 Februari 2011 kepada perayu telah mengemukakan cadangan-cadangan berikut: (i) penyatuan lima akaun dengan perayu yang mana dia adalah peminjam dan/atau penjamin; (ii) penyelesaian penghakiman terus yang diperoleh terhadap Puan Ling berjumlah RM1.8 juta; dan (iii) bahawa bayaran untuk jumlah penyelesaian itu adalah dari hasil lelongan awam hartanah peribadinya ('rumah Puan Ling'). Perayu melalui surat bertarikh 9 Mac 2011, menjawab bahawa ia bersetuju dengan cadangan untuk menyatukan lima akaun itu. Encik Chew telah gagal untuk membayar baki jumlah penyelesaian sebelum atau pada 29 Mac 2011 dan justeru perayu telah meneruskan dengan lelongan awam untuk hartanah itu bagi mendapat balik jumlah penghakiman. Pesuruhjaya kehakiman (PK) yang bijaksana telah memberikan responden-responden deklarasi berikut: (i) bahawa bayaran untuk jumlah RM1.8 juta oleh responden-responden kepada perayu adalah untuk penyelesaian penuh dan muktamad penghakiman terus; dan (iii) bahawa terdapat perjanjian antara responden-responden dan perayu bahawa jumlah penyelesaian perlu dibayar daripada hasil jualan rumah Puan Ling. PK mendapati bahawa terdapat kontrak antara Puan Ling dan perayu. PK memutuskan bahawa perilaku perayu dan khususnya penyatuan pelbagai akaun dan penarikan balik prosiding kebankrapan terhadap Puan Ling adalah penerimaan tawaran Puan Ling untuk menutup jumlah yang terhutang oleh syarikat itu kepada perayu pada RM1.8 juta dan untuk menyelesaikan jumlah tersebut daripada jualan rumah Puan Ling. Perayu telah merayu terhadap deklarasi-deklarasi tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tiada kontrak antara Puan Ling dan perayu. Berdasarkan fakta tiada justifikasi untuk menggunakan doktrin estopel (lihat perenggan 23).

(2) Jauh daripada memberi apa-apa gambaran bahawa perayu bersetuju

dengan cadangan Puan Ling, melalui surat beliau 22 Februari 2011, sebaliknya, ia mengingatkannya tentang desakan perayu tetang pematuhan dengan perjanjian penyelesaian yang telah dibuat lebih awal oleh perayu dengan Encik Chew, yang mempunyai tarikh akhir 29 Mac 2011 untuk pembayaran sejumlah RM1.171 juta. Oleh itu, penarikan balik prosiding kebankrapan terhadap Puan Ling bukan faktor material yang mewajarkan penggunaan doktrin estopel. Kandungan surat 25 Mac 2011 oleh perayu dengan jelas bertentangan dengan apa-apa penggunaan doktrin estopel (lihat perenggan 26).

(3) Tindakan itu responden adalah pramatang kerana responden telah memfailkan tindakan ini sebelum perayu dapat menjawab sepenuhnya kepada surat cadangan Puan Ling yang bertarikh 22 Februari 2011 itu. Responden-responden telah memfailkan guaman ini semasa rundingan antara pihak-pihak masih berjalan. Jawapan perayu kepada surat Puan Ling bertarikh 9 Mac 2011, dan surat itu menyatakan bahawa perayu akan menjawab kemudian berhubung dengan cadangan Puan Ling yang lain. Puan Ling sepatutnya memberi perayu peluang untuk memberikan jawapan lebih lanjut, seperti yang diminta oleh perayu. Namun, responden-responden, dengan tergesa-gesa, telah memfailkan tindakan writ mereka pada 15 April 2011 (lihat perenggan 28).]

Notes

For cases on settlement agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2995–2997.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Kerajaan Malaysia v Mohd Mokhtar bin Ali [1995] 4 MLJ 601, HC (refd)

Appeal from: Civil Suit No 22 NCVC-314 of 2011 (High Court, Kuala Lumpur)

Nurjuvita bt Kamarulzaman (Ummi Salhah bt Mohamad with her) (Lua & Mansor) for the appellant.
CB Liang (Nga Hock Cheh & Co) for the respondents.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judicial commissioner given on 24 October 2011. The decision was given after full trial of the action at the High Court of Kuala Lumpur.

[2] At the High Court, the respondents/plaintiffs sought, among others, the following declarations:

(a) a declaration that a payment of the sum of RM1.8m ('the settlement sum') by the respondents/plaintiffs to the appellant/defendant would be a full and final settlement of the summary judgment order of the High Court of Shah Alam dated 2 April 2008 obtained by the appellant/defendant against the respondents/plaintiffs via Shah Alam High Court Civil Suit No MT1–22–421 of 2006; and

(b) a declaration that there is an agreement between the respondents/plaintiffs and the appellant/defendant that the settlement sum be paid from the proceeds (a sum of RM3,800,000) of the sale by public auction of the double storey house of the second respondent/second plaintiff (Mdm Ling Yun Yoke) situated at No 41 Jalan Setiabakti, Bukit Damansara, Kuala Lumpur.

[3] The High Court, at the conclusion of the trial, granted the above declarations.

[4] The appellant now appeals to this court.

DECISION OF THIS COURT

[5] We have allowed the appeal with costs. We now give our grounds.

THE FACTS OF THE CASE

[6] By a loan agreement cum assignment dated 23 April 1997, the appellant bank (Malayan Banking, the defendant before the High Court) granted the first respondent/first plaintiff (a company called Sparrows & Arrows Sdn Bhd, which hereinafter shall be referred to as 'the company') a banking facility ('the facility') in the sum of RM1.2m. As a security for the facility, the company assigned its rights, benefits and interest in a commercial property unit at No B-0–5 Block B, Megan Avenue, situated at Jalan Yap Kwan Seng, Kuala Lumpur ('the Megan Avenue property') to the appellant/defendant. The assignment was via the aforesaid loan agreement cum assignment.

[7] There are two directors of the first respondent company, namely, one Mr Chew Nee Hee ('PW1') ('Mr Chew') and Mdm Ling Yun Yoke ('PW2') (the second respondent/second plaintiff — 'Mdm Ling'). Mr Chew and Mdm Ling are husband and wife.

[8] Mdm Ling ('PW2') and her husband, Mr Chew (PW1), are the guarantors of the facility under a guarantee agreement also dated 23 April 1997.

[9] The company (the first respondent), Sparrows & Arrows, defaulted on the facility. The defendant bank (the lender bank, the appellant), Malayan Banking, sued the company, Mdm Ling and Mr Chew to recover the sum outstanding under the facility at the Shah Alam High Court (Shah Alam High Court Civil Suit No MT1–22–421 of 2006). On 2 April 2008 Malayan Banking obtained summary judgment against all three of them, that is, the company, Mdm Ling and Mr Chew for the sum of RM1,724,928.16 (the sum owing as at 31 January 2006) plus interest at the prescribed rate ('the Shah Alam High Court summary judgment').

[10] However, by a letter dated 26 October 2010, Mr Chew, as a guarantor of the facility, proposed to Malayan Banking (the appellant) a sum of RM1.8m as the full and final settlement of the bank's claim against the respondents/plaintiffs and himself under the Shah Alam High Court summary judgment.

[11] Malayan Banking (the appellant), via its letter of 28 October 2010, agreed to the proposal but imposed a condition, namely, that the settlement sum of RM1.8m should reach the appellant before 29 March 2011. The actual terms of the settlement are these:

(a) Mr Chew (PW1) had to pay a sum of RM90,000 as upfront payment;

(b) the balance sum of RM1,710,000 was to be paid within 150 days, that is to say, on or before 29 March 2011; and

(c) in the event the balance sum was not paid by 29 March 2011, Malayan Banking would forfeit the upfront payment and the whole sum under the summary judgment would be recoverable by Malayan Banking against all the defendants in the Shah Alam suit.

[12] The sum of RM90,000 was duly paid by Mr Chew (PW1) to the defendant bank.

[13] In reliance of the above settlement, the company entered into a sale and purchase agreement dated 12 November 2010 with a company called 'Koperasi Kakitangan Petronas Berhad' for the sale of the Megan Avenue property at the price of RM3,850,000.

[14] Now, what had happened was that, in the meanwhile, Mdm Ling by a letter dated 22 February 2011 to Malayan Banking made the following proposals:

(a) a consolidation of five accounts with Malayan Banking where she stood as a borrower and/or guarantor (which also include two loan accounts in

A the name of a company called 'HS Dunamis Corporation Sdn Bhd', in respect of which Mdm Ling stood as a guarantor);

(b) a settlement of the Shah Alam High Court summary judgment obtained against Mdm Ling at RM1.8m; and

B (c) that the payment for the settlement sum would come from the proceeds of the public auction of her personal property (her Damansara house) that was charged to Malayan Banking as a security in respect of a facility where she was the borrower.

C **[15]** Malayan Banking, by a letter dated 9 March 2011, replied that the bank was agreeable to the proposal to consolidate the five accounts. But, as to the other proposals, the bank stated:

> We shall revert to you in respect of your proposal in due course.

D

[16] Now what happened was that Mr Chew (PW1) did not pay Malayan Banking the balance of the settlement sum by 29 March 2011. From the bank's standpoint, this means that the settlement agreement had lapsed and the total E judgment sum had become due and payable.

[17] Malayan Banking then proceeded with the public auction of the Megan Avenue property to recover the judgment sum. The respondents/plaintiffs immediately on 15 April 2011 filed the present suit and obtained an ex parte F order for an injunction to restrain the public auction on the ground that the company (the first respondent) had entered into a sale and purchase agreement with a third party. The existence of the sale and purchase agreement came as a surprise to the appellant, Malayan Banking, because there were no notification to, or consent given by, the bank, the secured creditor, for the sale of the Megan G Avenue property. It is to be recalled that the company had assigned its rights, benefits and interest in the Megan Avenue property to Malayan Banking as a security for the facility. The appellant/defendant resisted the application for an inter-partes injunction. However, the High Court gave an interim order pending full trial. The interim order was by way of a consent order. The learned H judicial commissioner allowed the sale and purchase agreement to proceed since the sale value is higher than the reserve price for the public auction.

THE GROUNDS OF THE DECISION OF THE HIGH COURT

I **[18]** The learned judicial commissioner, in allowing the declarations sought by the respondents'/plaintiffs', made a finding of the existence of a contract between Mdm Ling (the second respondent/second plaintiff) and Malayan Banking (the appellant/defendant). The High Court ruled that Mdm Ling's letter of 22 February 2011 to Malayan Banking was an offer and the bank's

letters of 9 and 30 March 2011, considered in the light of the withdrawal by Malayan Banking of its bankruptcy proceeding against Mdm Ling, and applying the principle of estoppel, constitute an acceptance of that offer.

[19] In this appeal, we begin by asking this question: Do the three letters (that we just mentioned) considered together with the withdrawal of the bankruptcy proceeding against Mdm Ling, as a matter of law, result in the formation of a contract between Mdm Ling and Malayan Banking?

[20] In making a finding that there was a contract formed by the three letters (considered in the light of the withdrawal of the bankruptcy proceeding against Mdm Ling), the learned judicial commissioner applied the doctrine of estoppel. This is how the learned judicial commissioner applied the doctrine of estoppel to the facts of the present case:

> [12] Clearly, the conduct of the Defendant in —
>
> (i) in only rejecting the 2nd Plaintiff's proposal in respect of H. S. Dunamis Corporation and not the 2nd Plaintiff's housing loan account and the 1st Plaintiff's facility account; and
>
> (ii) consolidating the various accounts as proposed by the 2nd Plaintiff; and
>
> (iii) withdrawing bankruptcy proceedings against the 2nd Plaintiff on 29 March 2011;
>
> had induced the 2nd Plaintiff into believing that a settlement was in place thus making her alter her position in reliance of the same. The Defendant would now be estopped from asserting otherwise.
>
> [13] In the circumstances, I find that by the Defendant's conduct and in particular the consolidation of the various accounts and the withdrawal of the bankruptcy proceedings against the 2nd Plaintiff on 29 March 2011 there is acceptance of the 2nd Plaintiff's offer to cap the 1st Plaintiff's amount owing to the Defendant at RM1.8 million and to settle the said amount from the sale of the Damansara Heights property.

[21] The learned judicial commissioner cited *Kerajaan Malaysia v Mohd Mokhtar bin Ali* [1995] 4 MLJ 601.

THE GROUNDS OF DECISION OF THIS COURT

[22] The doctrine of estoppel is explained clearly and at great length by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283. The well-researched judgment of the court was delivered by Gopal Sri Ram JCA (as he then was) who said (at p 344 (MLJ); p 294 (CLJ)):

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[23] In the present case, in our judgment, with respect, we are unable to agree with the finding of the learned judicial commissioner. We do not think that there was a contract between Mdm Ling and Malayan Banking, as alleged by the respondents/plaintiffs. We are of the view that on the facts there is no justification for invoking the doctrine of estoppel.

[24] In our judgment, with respect, we are unable to appreciate the respondents'/plaintiffs' reasoning that the combined effect of the three letters and the withdrawal of the bankruptcy proceeding against Mdm Ling, and applying the doctrine of estoppel, would lead one to the inevitable conclusion that in law there was an acceptance by Malayan Banking of Mdm Ling's proposals. With respect, we consider the reasoning to be rather far-fetched.

[25] We are fortified in our view that the principle of estoppel has no place in the context of the present case when we consider the full content of Malayan Banking's letter of 25 March 2011 to Mdm Ling:

> After due consideration, our management agreed to withdraw bankruptcy action against Madam Ling Yun Yoke on the Creditor's Petition hearing fixed on 29 March 2011 with liberty to file afresh.
>
> Kindly note that, the settlement arrangement dated 26-10-2010 remain status quo and you are to make full and final settlement sum of RM1.1710m on or before 29 March 2011. In the event of default of the above payment, the Bank reserves the right to terminate the repayment arrangement and to demand for the full and immediate settlement of all balance sum still outstanding.

[26] It is to be appreciated that the above letter, far from giving any impression that Malayan Banking was agreeable to Mdm Ling's proposals, vide her letter of 22 February 2011, on the contrary, reminded her of the Bank's insistence on compliance with the settlement agreement that the bank had earlier made with her husband, Mr Chew, that had a dateline of 29 March 2011 for the payment of the sum of RM1.1710m. Thus, with respect, we are at a loss to understand how the learned judicial commissioner considers the withdrawal of the bankruptcy proceeding against Mdm Ling to be a material factor justifying the invocation of the doctrine of estoppel. The way we see it, the content of the above letter of 25 March 2011 by the bank clearly militates against any invocation of the doctrine of estoppel.

[27] It is also important to appreciate that, subsequently, in Malayan Banking's letter of 30 March 2011 to Mdm Ling, the bank wrote to say that it rejected Mdm Ling's proposal (via her letter of 22 February 2011) that a payment of a sum of RM400,000 be taken as a full and final settlement of the two accounts of Dunamis Corporation. With respect, we fail to understand how the rejection of this proposal can be a basis for the invocation of the doctrine of estoppel, resulting in a finding that there was an acceptance on the part of Malayan Banking of Mdm Ling's proposal.

[28] In the present case, we also accept the submission of learned counsel for Malayan Banking that the respondents'/plaintiffs' action is premature. It is premature because the respondents/plaintiffs filed the instant action *before* Malayan Banking could respond fully to Mdm Ling's letter of proposal of 22 February 2011. Indeed, the respondents/plaintiffs filed the present suit when the negotiation between the parties was still ongoing. It is to be noted that Malayan Banking's reply to Mdm Ling's letter was dated 9 March 2011, and the letter stated that the bank would revert at a later to Mdm Ling on the remaining proposals. Mdm Ling should have given Malayan Banking an opportunity to give a further reply, as requested by the bank. Yet, the respondents/plaintiffs, in haste, filed their writ action on 15 April 2011; a matter of slightly more than a month later.

[29] Malayan Banking, however, did eventually issue its follow-up letters to Mdm Ling as it had indicated earlier in its letter of 9 March 2011. These follow-up letters are dated 30 March 2011 and 23 May 2011. We have earlier already referred to Malayan Banking's letter of 30 March 2011.

[30] Now, Malayan Banking's second letter of 23 May 2011 states that the global settlement sum for the five accounts was RM5,926,257.19; and this sum has to be settled by the respondents/plaintiffs by 31 June 2011. Malayan Banking also states in its letter that it did not agree to the utilisation of the proceeds of the auction sale of Mdm Ling's Damansara house for the purpose of settling the company's account with Malayan Banking. With regard to the company's account, this is what the bank states in its letter:

(B) Sparrows & Arrows Sdn Bhd (A/C 414570202078)

> You have stated factual errors here. The offer for you to settle RM1.8 million has expired on 29-3-2011. You have sent your without prejudice letter dated 22-2-2011 but you did not pay to the bank RM1.8 million on or before the expiry date of 29-3-2011. Therefore, the offer lapsed and of no further effect from 30-3-2011. Accordingly, the old figure of RM1.8 million is not the correct settlement sum now as what you alleged.

You are not in a position to unilaterally impose terms and conditions in this paragraph and deemed that the debts have been extinguished. We do not agree to Para B of page 2 of the said letter dated 22-2-2011.

[31] Now, para (B) of the letter of 22 February 2011 states:

(B) Sparrows & Arrows Sdn Bhd (A/C 414570202078)

A judgment has been obtained against me in my capacity as one of the joint & several guarantors of the above company and the amount I am responsible for is RM1.8 million. I hereby authorize the bank to offset this RM1.8 million from the proceeds of the sale of the house, thereby A/C 414570202078 is deemed fully settled and the debts extinguished upon my execution of consent or the bank exercising its right of consolidations provided for in my loan agreements. The RM90,000 upfront payment on 26 October 2010 which was earlier advanced by a third party is to be refunded.

[32] In our judgment, if we were to view objectively the following four letters, namely:

(a) Mdm Ling's letter of 22 February 2011 to Malayan Banking;

(b) Malayan Banking's letter of 9 March 2011 to Mdm Ling;

(c) Malayan Banking's letter of 30 March 2011 to Mdm Ling; and

(d) Malayan Banking's letter of 23 May 2011 to Mdm Ling;

it is clear that there was nothing conclusive between the parties.

[33] The respondents/plaintiffs allege that the letter of 23 May 2011 was an afterthought since it was issued some three months after Mdm Ling's letter of 22 February 2011. The learned judicial commissioner accepted this contention. With respect, we find no basis for such an allegation. The evidence shows that the bank promptly replied to Mdm Ling on 9 March 2011; and it gave a further reply on 30 March 2011; and it came up with a final reply on 23 May 2011. We do not find any evidence showing that the bank was dragging its feet or that the letter of 23 May 2011 was a mere afterthought. Upon examining the content of the bank's letter of 23 May, we are satisfied that it is a genuine detailed response by Malayan Banking to Mdm Ling's proposals; and we accept as reasonable the submission of learned counsel for Malayan Banking that the bank took some time to come out with a global settlement sum because the evidence shows that the five accounts involved various

departments of the bank.

CONCLUSION

[34] In conclusion, we hold that since the respondents'/plaintiffs have failed to establish the existence of a contract for the settlement of the judgment debt, therefore, the sum in the summary judgment stands; and the respondents/plaintiffs are liable to Malayan Banking for this sum.

Appeal allowed with costs.

Reported by Kanesh Sundrum